Re Lee Che Peh aka Lee Chee Peh, ex p Tractors Malaysia (1982) Sdn Bhd

HIGH COURT (MELAKA) — BANKRUPTCY NO 29–1138 OF 2000
LOW HOP BING J
13 MARCH 2003

Bankruptcy *— Notice — Issue of — Leave to enforce judgment under O 46 r 2(1)(a) of the Rules of the High Court 1980 obtained — Leave obtained expired — Whether bankruptcy notice may be issued after expiry of leave to enforce judgment*

This was an appeal by the judgment creditor ('JC') against the decision of the learned registrar who had allowed the application by the judgment debtor ('JD') to set aside the bankruptcy notice issued by the JC against the JD ('the impugned bankruptcy notice'). The question for determination in this appeal was whether upon a proper interpretation of s 3(1)(i) of the Bankruptcy Act 1967 and O 46 r 2(1)(a) of the Rules of the High Court 1980, the JC, who had obtained leave to enforce the judgment under O 46 r 2(1)(a) of the Rules of the High Court 1980 could legally sustain the bankruptcy notice issued after expiry of the leave obtained to enforce the judgment.

Held:

Upon a proper perusal and careful consideration of s 3(1)(i) of the Bankruptcy Act 1967, the sine qua non for the issue of a bankruptcy notice in order to establish the commission of an act of bankruptcy by a judgment debtor is that there must be a final judgment or final order which the judgment creditor is entitled to enforce; *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 1 MLJ 508 followed. In the instant case, the JC had to comply with the mandatory requirement of O 46 r 2(1)(a) of the Rules of the High Court 1980 which required the obtaining of leave for the purpose of issuing the impugned bankruptcy notice; *Tengku Iskandar bin Tengku Ahmad v Sime Bank Bhd* [2002] 1 MLJ 312, *Re Haji Ahmad bin Lazim & Ors; ex p Bank Kerjasama Rakyat (M) Bhd* [1999] 5 MLJ 478 and *Re Low Tung Kwai; ex p Perwira Affin Bank Bhd* [2001] 6 MLJ 39 followed. The question for determination was therefore answered in the negative (see pp 467D, 468F–G, 469D).

[Bahasa Malaysia summary

Ini merupakan rayuan oleh si piutang penghakiman ('SPP') terhadap keputusan pendaftar yang arif yang telah membenarkan permohonan oleh penghutang penghakiman ('PP') untuk satu perintah untuk mengenepikan notis kebankrapan yang dikeluarkan oleh SPP terhadap PP ('notis kebankrapan yang dipersoalkan'). Persoalan untuk ditentukan di dalam rayuan ini adalah sama ada di atas tafsiran betul s 3(1)(i) Akta Kebankrapan 1967 dan A 46 k 2(1)(a) Kaedah-

Kaedah Mahkamah Tinggi 1980, SPP yang telah menerima kebenaran untuk menguatkuasakan penghakiman di bawah A 46 k 2(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 boleh mengekalkan di sisi undang-undang notis kebankrapan yang telah dikeluarkan setelah luputnya kebenaran yang diterima untuk menguatkuasakan penghakiman itu.

Diputuskan:

Pada penelitian betul dan pertimbangan cermat s 3(1)(i) Akta Kebankrapan 1967, sine qua non isu notis kebankrapan untuk menentukan pelakuan satu perbuatan kebankrapan oleh seorang penghutang penghakiman adalah mesti terdapat satu penghakiman muktamad atau perintah muktamad yang boleh dikuatkuasa oleh si piutang penghakiman; *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 1 MLJ 508 diikut. Di dalam kes ini, SPP dikehendaki mematuhi peruntukan mandatori A 46 k 2(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 yang memerlukan kebenaran didapatkan untuk mengeluarkan notis kebankrapan yang dipersoalkan itu; *Tengku Iskandar bin Tengku Ahmad v Sime Bank Bhd* [2002] 1 MLJ 312, *Re Haji Ahmad bin Lazim & Ors; ex p Bank Kerjasama Rakyat (M) Bhd* [1999] 5 MLJ 478 dan *Re Low Tung Kwai; ex p Perwira Affin Bank Bhd* [2001] 6 MLJ 39 diikut. Soalan untuk ditentukan itu telah dijawab dengan negatif (lihat ms 467D, 468F–G, 469D).

Notes

For cases on the issue of a bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1746–1747.

Cases referred to

Arab-Malaysian Finance Bhd v Mohd Zakaria bin Salim [2002] 3 MLJ 337 (refd)

Haji Ahmad bin Lazim & Ors, Re; ex p Bank Kerjasama Rakyat (M) Bhd [1999] 5 MLJ 478 (folld)

Lim Ah Hee @ Sim Ah Hee, Re, ex p Perwira Affin Bank Bhd [1997] 4 MLJU 46 (refd)

Low Tung Kwai, Re; ex p Perwira Affin Bank Bhd [2001] 6 MLJ 39 (folld)

Tengku Iskandar bin Tengku Ahmad v Sime Bank Bhd [2002] 1 MLJ 312 (folld)

Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd [1989] 3 MLJ 508 (folld)

Legislation referred to

Bankruptcy Act 1967 s 3(1), (i)
Bankruptcy Rules 1969 rr 95(1), 110
Rules of the High Court 1980 O 46 r 2(1)(a)

Desmond J Louis (*LM Ong & Co*) for the judgment creditor.
KH Teoh (*KH Teoh & Associates*) for the judgment debtor.

Low Hop Bing J:

APPEAL

This is an appeal by the judgment creditor ('JC') against the decision of the learned registrar who had on 27 August 2001 allowed the application in encl (8) filed by the judgment debtor ('JD') for an order to set aside the bankruptcy notice dated 30 November 2000 issued by the JC against the JD ('the impugned bankruptcy notice').

GROUNDS RAISED BEFORE THE REGISTRAR

Before the learned registrar, the JD raised the following grounds:

(1) the discrepancy in the names Lee Che Peh and Lee Chee Peh;

(2) lapse of the one year leave to execute the default judgment where six years or more had lapsed since the date of the judgment;

(3) the impugned bankruptcy notice was in the English language; and

(4) duplicity in that there was yet another bankruptcy notice issued against the JD on 29 February 2000 vide Bankruptcy Case No 29–151–2000.

Grounds 1, 3 and 4 above had been duly considered and dismissed by the learned registrar, and there was no appeal by the JD in which case they are now non-issues before me. That being the case, there is no necessity for me to further consider those grounds.

However, ground 2 has been sustained and upheld by the learned registrar. In this appeal to me as judge in chambers, I shall confine my deliberation and determination in relation to this issue only.

SUBMISSION FOR THE JC

In this appeal, Mr Desmond J Louis, learned counsel for the JC, submitted that bankruptcy proceedings do not come within the form of execution but is a species of its own and therefore is not caught by the requirements of O 46 r 2(1)(a) of the Rules of the High Court 1980, relying on *Re Lim Ah Hee @ Sim Ah Hee, ex p Perwira Affin Bank Bhd* [1997] 4 MLJU 46, and that the Bankruptcy Act 1967 and Bankruptcy Rules 1969 would apply.

He added that under the Rules of the High Court 1980, judgments and orders may be enforced by way of:

(1) writ of seizure and sale;

(2) garnishee proceedings;

(3) charging order;

(4) appointment of receiver;

(5) order of committal;

(6) writ of possession; and

(7) writ of delivery.

He stressed that the JD is denied the opportunity to challenge the aforesaid forms of execution whereas in bankruptcy proceedings, the JD is afforded the liberty to challenge a bankruptcy notice, eg within seven days of the service thereof on the JD, by filing an affidavit which shall operate as an application to set aside the bankruptcy notice, under r 95(1) of the Bankruptcy Rules 1969.

He reiterated that leave under O 46 r 2(1)(a) is not mandatory. In any event, he urged the court to follow the decision of the Court of Appeal in *Arab-Malaysian Finance Bhd v Mohd Zakaria bin Salim* [2002] 3 MLJ 337 where a breach of r 110 of the Bankruptcy Rules 1969 was held to be an irregularity.

CONTENTION FOR THE JD

In respect of the leave for execution under O 46 r 2(1)(a), Mr KH Teoh, learned counsel for the JD, stated that the default judgment was obtained by the JC on 20 October 1987 and the one year leave for execution was granted to the JC on 12 January 1998, which had expired on 12 January 1999, while the impugned bankruptcy notice was issued on 30 November 2000. He relied on *Re Low Tung Kwai; ex p Perwira Affin Bank Bhd* [2001] 6 MLJ 39 to support his contention that after expiry of the leave, fresh leave was required to issue the impugned bankruptcy notice.

He added that O 46 r 2(1)(a) did apply to bankruptcy actions, citing in support *Tengku Iskandar bin Tengku Ahmad v Sime Bank Bhd* [2002] 1 MLJ 312; and that leave obtained but which had expired was as bad as no leave had been obtained, relying on *Re Haji Ahmad bin Lazim & Ors; ex p Bank Kerjasama Rakyat (M) Bhd* [1999] 5 MLJ 478.

DECISION OF THE COURT

Question for determination in this appeal

On the facts as alluded to above and having regard to the aforesaid respective submissions, the question for determination in this appeal may be formulated as follows: upon a proper interpretation of s 3(1)(i) of the Bankruptcy Act 1967 and O 46 r 2(1)(a) of the Rules of the High Court 1980, can the JC, who has obtained leave to enforce a judgment under the said O 46 r 2(1)(a) but the leave so obtained has expired, legally sustain the impugned bankruptcy notice which was issued after the expiry date of the leave?

Section 3(1)(i) of the Bankruptcy Act 1967

A good starting point for the commencement of bankruptcy proceedings by way of a bankruptcy notice has been spelled out in great detail in s 3(1) of the Bankruptcy Act 1967, which also provided for the commission of acts of bankruptcy by a debtor.

A For the purposes of this judgment, the relevant provision contained in s 3(1)(i) which, where material, is reproduced as follows:

> 3 Acts of Bankruptcy
>
> A debtor commits an Act of bankruptcy ...
>
> (i) if a creditor has obtained a *final judgment* or *final order* against him for any amount and execution thereon not having been stayed has served on him ..., a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of the bankruptcy notice or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice ... comply with the requirements of the notice ...
>
> Provided that for the purposes of this paragraph and of section 5 *any person* who is for the time being *entitled to enforce a final judgment or final order* shall be deemed to be a creditor who has obtained a final judgment or final order ... . (Emphasis added.)

Upon a proper perusal and careful consideration of s 3(1)(i), I am of the view that the sine qua non for the issue of a bankruptcy notice in order to establish the commission of an act of bankruptcy by a judgment debtor is that there must be a final judgment or final order which the judgment creditor is entitled to enforce. Support for my view may be found in the judgment of Edgar Joseph Jr J (later FCJ) in *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508 where his Lordship gave a summary of the position in the UK as follows at p 510:

> ... a creditor can issue a bankruptcy notice only when he has obtained a final judgment or a final order. The judgment or order must be one on which the creditor is in a position to issue execution so that if execution cannot be issued at all, no bankruptcy notice can be issued. If the execution can be issued only with leave of the court, the creditor must obtain such leave before he can issue a bankruptcy notice.

In *Wee Chow Yong*, his Lordship upheld the relevant ground raised by the judgment debtor to impugn the bankruptcy notice issued on 12 May 1988 but served on him on 9 June 1988, as the bankruptcy notice was founded on a judgment debt which came into existence on 13 May 1982, and that the proceedings in bankruptcy had been commenced more than six years after judgment without leave of the court as required under O 46 r 2(1)(a).

A similar issue, inter alia, arose in *Re Haji Ahmad bin Lazim*, where the judgment, upon which the relevant bankruptcy notice was founded, had been obtained more than six years ago. After considering s 3(1)(i) of the Bankruptcy Act 1967, O 46 r 2(1)(a) of the Rules of the High Court 1980 and following *Wee Chow Yong*, Clement Skinner JC (now J) held at p 489:

> ... if more than six years have elapsed since a judgment is obtained, and leave has not been obtained to execute that judgment, the judgment creditor cannot be described as being in a position to issue execution on that judgment. If execution can be issued only with leave of the court, such leave must be obtained before a bankruptcy notice can be issued thereon.

Wee Chow Yong, and *Re Haji Ahmad bin Lazim*, were subsequently followed and the same conclusion was arrived at by Ahmad Maarop JC (now J) in *Re Low Tung Kwai*, where the judgment creditor obtained a judgment against the judgment debtor on 18 December 1986 and the bankruptcy notice was issued on 30 April 1998, when leave under O 46 r 2(1)(a) had already been granted, but such leave was set aside on 28 July 1998. Hence, his Lordship held, in the English translation of the headnote at p 41, inter alia, as follows:

> The precondition for the issuance of the bankruptcy notice dated 30 April 1998, that exceeded six years from the judgment date, is leave granted under O 46 r 2(1) of the RHC. Since leave had been set aside, the precondition for the issuance of the bankruptcy notice no longer exists. As the precondition no longer exists, the execution of the judgment dated 18 December 1986 could not be carried out. Thus the judgment was not the judgment obtained by the judgment creditor and it was not a final order. As a result, not a single act of bankruptcy could be proved against the judgment creditor.

Application of O 46 r 2(1)(a) to bankruptcy actions

Order 46 r 2(1)(a) of the Rules of the High Court 1980 reads as follows:

> When leave to issue any writ of execution is necessary (O 46 r 2)
>
> (1) A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say:
>
> (a) where six years or more have lapsed since the date of the judgment or order;

The aforesaid provisions of O 46 r 2(1)(a) have been held to apply to bankruptcy actions, and arguments to the contrary have been consistently dismissed by our courts, eg by Suriyadi J in *Tengku Iskandar bin Tengku Ahmad*; by Edgar Joseph Jr J (later FCJ) in *Wee Chow Yong*; by Clement Skinner JC (now J) in *Re Haji Ahmad bin Lazim* and by Ahmad Maarop JC (now J) in *Re Low Tung Kwai*, who have, in my view, correctly stated the legal position in relation to the application of O 46 r 2(1)(a) to bankruptcy actions. In the circumstances, I adopt and apply this principle and hold that the JC herein is required to comply with this mandatory requirement of obtaining leave for the purpose of issuing the impugned bankruptcy notice.

In respect of the contention for the JC herein relying on *Re Lim Ah Hee*, that only the provisions of the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 would apply to a bankruptcy action, to the exclusion of O 46 r 2(1)(a), it must be immediately emphasized that in *Re Lim Ah Hee*, the judgment of Haidar J (now CJ (Malaya)) clearly showed that out of the two preliminary objections raised by the judgment debtor, the first was that leave has not been obtained from the court to execute where six years or more have lapsed since the date of the judgment or order pursuant to O 46 r 2(1)(a). Counsel for the judgment debtor there subsequently informed his Lordship that he would not be pursuing that issue as the relevant leave has been obtained, and so that issue pertaining to leave has therefore been withdrawn from consideration: see also *Re Haji Ahmad bin Lazim*, p 489. Hence, his Lordship's judgment is confined to the second issue only relating

A to statute barred interest which has nothing to do with the issue for determination by me in the instant appeal.

If the submission for the JC that no leave was required under O 46 r 2(1)(a) had indeed reflected the correct legal position, then, in the first place, there would have been no necessity whatsoever for him to obtain the one year leave which had subsequently expired. The fact that he had applied for and obtained the said leave spoke volumes on the requirement for such leave.

I am mindful of the Court of Appeal's judgment in *Arab-Malaysian Finance Bhd* where the issue was whether the service of a photostat copy of the creditor's petition on the judgment debtor vitiated the bankruptcy proceedings in toto and the Court of Appeal answered it in the negative. The judgment of the Court of Appeal made no general or specific reference to the issue raised in this appeal pertaining to the obtaining of the leave for the purposes of O 46 r 2(1)(a). In the circumstances, I am of the view that this authority provides no assistance or support in favour of the JC.

Conclusion

The weight of authorities as adumbrated above would seem to me to militate against the contention advanced for the JC. The answer to the above question for determination is therefore in the negative. The learned registrar has carefully considered the facts and the law and, in my view, has arrived at the correct decision. I therefore affirm the learned registrar's decision and dismiss this appeal with costs.

Postscript

By way of a postscript, on the facts as unfolded and narrated in this appeal, in order to issue a fresh bankruptcy notice against the JD, the JC must first obtain leave under O 46 r 2(1)(a). However, it is left to the JC's learned legal adviser to consider and pursue the proper proceedings as may be deemed fit and necessary.

Order accordingly.

Reported by Peter Ling